United States Court of Appeals

for the Second Circuit

REPLY BRIEF

75-2130

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2130

JOE STEVENSON SADDLER,

Appellant,

-against-

UNITED STATES OF AMERICA

Respondent.

Appeal from the United States District Court for the Eastern District of New York

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REPLY BRIEF

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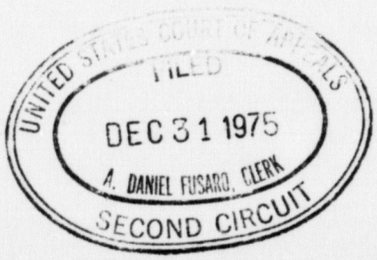

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P/S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED (Cont'd) PAGE

STATUTES CITED

MISCELLANEOUS AUTHORITY CITED

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JOE STEVENSON SADDLER,

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This brief is submitted on behalf of Appellant, Joe Stevenson Saddler, in reply to specific arguments and statements made in the brief of Respondent, United States of America. Failure to reply to a particular matter in the Government's brief means only that the matter has been sufficiently addressed in Appellant's main brief or that it is insignificant with respect to the disposition of this case.

ARGUMENT

POINT I

THE GUILTY PLEA MUST BE VACATED BECAUSE OF THE IMPOSSIBILITY OF MAKING A RETROSPECTIVE DETERMINATION OF APPELLANT'S COMPETENCY UPON THE PRESENT STATE OF THE RECORD

The Government has conceded the error of the District Court's summary disposition of this case and seeks to excuse the prejudice that has resulted from a further two year delay in the resolution of Appellant's claims by taking the same position on this appeal that it took in the §2255 proceeding below -- that this matter should be remanded to the District Court for a judicial determination of Appellant's mental condition at all relevant times, to be preceded by a nunc pro tunc psychiatric evaluation of Appellant's competency at the time of plea and sentence over three years ago.

Appellant must reject this confession of error as conceding too little, too late.

A. A Retrospective Determination of Competency Is Impossible In This Case, As Three Years Have Elapsed Since Plea and Sentence and No Contemporaneous Psychiatric Evidence Exists to Allow For a Meaningful Nunc Pro Tunc Determination

Appellant's respective counsel at plea and sentence both consistently demanded psychiatric evaluation of their client, and,

indeed, the Government initially responded to the §2255 petition filed in the proceeding below by requesting a psychiatric evaluation.

Had Judge Costantino heeded any of these requests for psychiatric evaluation, this matter may very well have been properly resolved long ago. Through no fault of his own, however, Appellant has been denied and deprived of the proper psychiatric evaluation which the Government concedes he has been rightfully entitled to for well over three years.

Now, once again, the Government urges this selfsame course upon this Court, at a time when the passage of the years has rendered insuperably more onerous Appellant's prospects of proving his allegations of incompetency.

Where, as here, Appellant has consistently asserted his right to psychiatric evaluation and the Government has asserted this right on his behalf in the §2255 proceedings below, but where the exercise of this right has been thwarted throughout by the District Judge's consistent and clear abuse of discretion, it would work a manifest injustice for this Court to remand for a belated psychiatric examination, since no contemporaneous psychiatric evidence exists upon which to base a meaningful factual determination.

On the three occasions in which it has considered fashioning an appropriate remedy for a deprivation of the right

to a proper psychiatric evaluation and hearing contemporaneous with trial, the Supreme Court has emphasized repeatedly "the doubts and ambiguities regarding the legal significance of...psychiatric testimony and the resulting difficulties of retrospectively determining...competency." In each instance, the Court has remanded for a new trial, rather than attempted retrospective determination of competency. Dusky v. United States, 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375, 386 (1966); Drope v. Missouri, 420 U.S. 162, 183 (1975).

The difficulties of attempting a retrospective determination are compounded in this case by the complete absence of any psychiatric examination, or records of any kind, contemporaneous with plea or sentence.

Under similar circumstances, Judge Bazelon directed a new trial, rather than an evidentiary hearing:

> A retrospective determination of competency is difficult at best. It is virtually impossible where, as here, there is no contemporaneous testimony or evidence of appellant's competence at the time of trial and where his present condition - incarcerated and presumably no longer under the influence of narcotics or suffering from withdrawal - is unquestionably different. An expert who now examined him could do no more than speculate unduly about his mental condition at his trial a year ago.
>
> Hansford v. United States, 365 F.2d 920, 926 (D.C.Cir. 1966)

See also, United States v. David, 511 F.2d 355, 362 (D.C.Cir. 1975); Holloway v. United States, 343 F.2d 265, 267 (D.C.Cir. 1964); United States v. Roca-Alvarez, 474 F.2d 1274 (5th Cir. 1973), and other cases cited in Appellant's main brief at 27-30.

Moreover, the similarity of Appellant's plight to that of the §2255 petitioner before Judge Weinfeld in Sullivan v. United States, 205 F.Supp 545 (S.D.N.Y. 1962), who had been tried and sentenced before completion of his competency examination, is striking. Judge Weinfeld declined the Government's request for a nunc pro tunc examination and hearing, and vacated the conviction outright, analyzing the inherent difficulties of engaging in such factual relitigation and reflecting on petitioner's consistent assertion throughout of his right to such an examination:

> To determine the issue nunc pro tunc has disadvantages. It is questionable that at present, almost three years after the trial - a delay in no respect attributable to petitioner - a psychiatrist would have as informed an opinion as to whether [the defendant], as he sat through the trial, understood the proceedings or had sufficient ability to consult rationally with his lawyer, as the psychiatrist then appointed to examine him and to make current findings. At best, we can get only the professional judgment of psychiatrists today as to what [the defendant's] condition was three years ago. While of necessity all psychiatrists' opinions are matters of judgment, a judgment years after the event appears to be a rather inadequate substitute for the opinion of the psychiatrist appointed for that very purpose in advance of and at the time of trial.
>
> Sullivan v. United States, supra, 205 F.Supp. at 551.

B. Those Circuits Which Have Sustained Retrospective Determinations Have Done So Only in Cases with Extensive Contemporaneous Psychiatric Records

In virtually every instance in which competency questions have been remanded for retrospective determination, the remand has been premised upon the existence of sufficiently extensive contemporaneous psychiatric examinations, records and reports upon which the district court could reasonably be expected to base meaningful factual findings.

Thus, while the Government relies upon Conner v. Wingo, 429 F.2d 630 (6th Cir. 1970), for the unexceptionable proposition that retrospective competency determinations are not per se improper under appropriate circumstances, closer scrutiny reveals that the Sixth Circuit based its ultimate determination on the existence of significant contemporaneous psychiatric evidence to sustain the district court's findings of fact, stating:

> We recognize also that in some circumstances the only appropriate remedy may be issuance of the writ and retrial after a current hearing on competence. [Citations omitted.] But we believe that the record of evidence contemporaneous to this trial before the state court postconviction judge fairly supports his competency findings. . . .
>
> Conner v. Wingo, supra, 429 F.2d at 640.

In Barefield v. State of New Mexico, 434 F.2d 307 (10th Cir. 1970), the Tenth Circuit similarly sustained a denial

of a writ of habeas corpus after an evidentiary hearing, where the witnesses at the later hearing were the very psychiatrists who had originally examined the petitioner prior to his plea of guilty. The Court stated that under these circumstances -- where contemporaneous psychiatric evidence existed, but a hearing had not been held at the time -- the mere lapse of time did not vitiate the findings made as a result of those earlier examinations. Accord, Crail v. United States, 430 F.2d 459 (10th Cir. 1970); Arnold v. United States, 432 F.2d 871 (10th Cir. 1970).

This Circuit has recently sustained the making of such retrospective determinations. It has done so, however, only in cases where there were extensive psychiatric records, examinations, and judicial findings contemporaneous with plea and sentence. United States ex rel. Suggs v. LaValle, 390 F.Supp 383 (S.D.N.Y.), vacated, 523 F.2d 539 (2d Cir.), on remand, 400 F.Supp 1366 (S.D.N.Y. 1975); United States ex rel. Putmon v. Henderson, F.2d , No. 74-2586 (2d Cir., August 19, 1975).

Moreover, in those cases where the courts have remanded for initial feasibility determinations out of concern over the difficulties of making retrospective determinations, the psychiatric records were far more extensive than in Appellant's case. Rose v. United States, 513 F.2d 1251, 1257 (8th Cir. 1975); United States v. Makris, 483 F.2d 1082, 1092 (5th Cir. 1973); United States v. McEachern, 465 F.2d 833, 839 (5th Cir.), cert. denied, 409 U.S. 1043 (1972).

C. The Record of Plea and Sentence Contains Substantial Evidence of Incompetence to Warrant Vacatur of Plea Without Hearing

In opposing outright vacatur of the plea, and requesting remand for an evidentiary hearing, the Government attempts to "haunt" this Court with the ominous spectre of prisoners obtaining new trials by raising "properly timed" claims of incompetency, thereby thwarting efficient judicial administration, Miranda v. United States, 458 F.2d 1179, 1182 (2d Cir. 1972).

On the face of this record, that claim is arrant nonsense. Judge Costantino was well aware at the time of plea of Appellant's history of mental illness, suicide attempts and narcotics addiction, yet made little or no independent inquiry of his own. Furthermore, the evidence of Appellant's incoherence and inability to comprehend the proceedings at sentence is clear and convincing on the record.

The Government's position is obviously premised on the so-called "files and records" rule of 28 U.S.C. §2255, which provides, in pertinent part, that an evidentiary hearing must be held where the files and records do not conclusively establish that a petitioner is entitled to no relief on the basis of his claims. Taylor v. United States, 487 F.2d 307 (2d Cir. 1973).

Certainly, it is clear that, where a §2255 petitioner raises only conclusory claims of mental incompetence or narcotics addiction

that are categorically rejected on the record, the petition may be dismissed summarily, without the necessity of an evidentiary hearing. Malcolm v. United States, 432 F.2d 809, 812 (2d Cir. 1970); United States v. Falu, 421 F.2d 687 (2d Cir. 1969).

Where, on the other hand, the record is silent as to claims of mental incompetency, but the petitioner raises detailed factual issues not specifically refuted by the files and records, a hearing will ordinarily be required in order to test these newly raised claims. Sanders v. United States, 373 U.S.1, 20 (1963); United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971).

It is primarily this latter category of cases to which the Government refers when it warns of a prisoner inventing claims of mental incompetence on a silent record to obtain a new trial. Miranda v. United States, supra, 458 F.2d at 1182.

Appellant's situation, however, falls into yet a third category -- that of §2255 claims in which the allegations are specifically and affirmatively supported and substantiated by the files and records of the case and where the record demonstrates conclusively his entitlement to relief without an evidentiary hearing. Moore v. United States, 464 F.2d 663 (9th Cir. 1972). Sullivan v. United States, supra.

The sentencing minutes [Appendix, Exhibit 5] conclusively demonstrate Appellant's incompetence and the complete failure of the District Judge to make any inquiry whatsoever when the matter was specifically brought to his attention.

First of all, the presentence report detailed Appellant's psychiatric hospitalizations and narcotics addiction, of which the District Judge had been well aware, in any event, from Appellant's testimony at the pre-trial suppression hearing (Government's Appendix) and from Appellant's counsel at the time of plea.

Second, Appellant's attorney specifically moved for psychiatric evaluation of his client before sentence, pursuant to 18 U.S.C. §4208(b), supplementing the request with a letter from Knickerbocker Hospital detailing psychiatric, narcotics and suicidal difficulties.

Third, Appellant's attorney specifically represented to the Court that he had attempted to speak with Appellant that very morning and had been unable to communicate with him because of his client's "incoherence".

Judge Costantino thereupon attempted to speak with Appellant - not to inquire into his mental condition, but merely to satisfy the allocution requirement before imposing sentence. When he was unable to secure a meaningful response, the District Judge simply went ahead and imposed sentence.

Thereupon, in what is by far the most compelling demonstration of Appellant's disorientation at sentence, the transcript reveals that Appellant had to ask the United States Marshal ushering him out of the Courtroom who his lawyer was. Appellant did not even recognize his own lawyer at sentence - the same lawyer who had attempted to speak with him shortly before sentencing that very morning. A more flagrant example of Appellant's psychiatric disorientation can hardly be imagined!

Based upon this clear and compelling evidence of mental disorientation, it cannot be seriously disputed that a substantial probability of incompetency at sentence is squarely demonstrated by the record. Under these circumstances resort to a retrospective evidentiary hearing is unnecessary, particularly in light of the procedure's inherent difficulties.

Under similar circumstances, where the record plainly revealed evidence of incompetency, the Ninth Circuit vacated a guilty plea outright, stating:

> The face of the record before the trial court at the time Moore's plea was taken revealed facts that compelled a Pate evidentiary hearing. The record before us shows that no hearing was ordered. The due process violation is thus shown without resort to any facts dehors the record. It is therefore unnecessary for us to remand the case for an evidentiary hearing to decide the merits of Moore's due process claim. Even if it were possible to eradicate nunc pro tunc the due process deprivation, the present conduct of an evidentiary hearing to determine whether Moore was competent to stand trial years ago is not a profitable exercise for reasons expressed in Pate.
>
> Moore v. United States, supra, 464 F.2d at 666-667.

D. The Statutory Procedure By Which the Government Seeks to Determine Appellant's Present Mental Condition Is Unconstitutional

The Government attempts to invoke 18 U.S.C. §4241 in order to make a determination of Appellant's "present mental condition." It is manifest, however, that the procedures of §4241 are patently unconstitutional.

Under §4241, the board of examiners:

> "...shall examine any inmate...alleged to be insane or of unsound mind or otherwise defective and report their findings and the facts upon which they are based to the Attorney General.
>
> The Attorney General, upon receiving such report, may direct the warden or superintendent or other official having custody of the prisoner to cause such prisoner to be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons charged with or convicted of offenses against the United States..."
>
> 18 U.S.C. §4241.

It cannot seriously be contested that a statute which mandates administrative commitment from prison to mental hospital solely on the basis of an examination report, without any provision for prior notice, judicial hearing, jury trial, or right to counsel is flagrantly violative of a prisoner's constitutional right to procedural due process and procedural equal protection (see Baxstrom v. Herold, 383 U.S. 107 (1966)), particularly in light of United States ex rel. Schuster v. Herold, 410 F.2d

1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969) and Matthews v. Hardy, 420 F.2d 607 (D.C.Cir. 1969), cert. denied, 397 U.S. 1010 (1970); see Chesney v. Adams, 377 F.Supp. 887 (D.Conn. 1974), aff'd, 508 F.2d 836 (2d Cir. 1975). Cf. O'Connor v. Donaldson, 422 U.S., 95 S.Ct. 2486 (1975).

Furthermore, it is doubtful that the alternative provisions of 18 U.S.C. §4245 are appropriately invoked in this case, as these provisions relate to situations where the alleged incompetency was undisclosed at trial. Sullivan v. United States, supra, 205 F.Supp at 550 n. 10; see Comment, Retroactive Determination Under 18 U.S.C. §4245 of A Prisoner's Incompetency to Stand Trial, 28 Univ. Chi. L. Rev. 151 (1960); Swadron, Collateral Attack of Federal Convictions on the Ground of Mental Incompetency, 29 Temple L.Q. 117, 119-121 (1966).

POINT II

THE DISTRICT COURT'S FAILURE TO MAKE ANY INQUIRY INTO APPELLANT'S MENTAL CONDITION AS IT REFLECTED ON THE VOLUNTARINESS OF HIS GUILTY PLEA DENIED HIM DUE PROCESS

The Government would have this Court believe that, even if probable incompetence existed at the time of sentence, it in no way affected the validity of the guilty plea itself, and that,

moreover, the District Judge's observations of Appellant at the time of plea should obviate the need for any psychiatric inquiry into competency or the validity of the waiver of significant constitutional rights implicit in a plea of guilty.

On the face of this record, that argument is a very weak reed upon which to lean.

In the first place, the record of the plea colloquy is a most ambiguous and inconclusive document upon which to base any claim that a searching and probing inquiry into defendant's state of mind had been made. Compare Wolcott v. United States, 407 F.2d 1149 (10th Cir. 1969). The District Judge asked, at most, three "boiler-plate" questions dealing with the voluntariness of the plea and received the standard rote answers.

It seems almost inconceivable that the District Judge could have contented himself with as superficial an inquiry as was made in this case, in view of the evidence that had come to light at the pre-trial suppression hearing dealing with Appellant's narcotics addiction. Indeed, even before the 1966 amendments to Rule 11 of the Federal Rules of Criminal Procedure, this Circuit required that a trial judge make significant inquiry of the accused before accepting a plea of guilty, in order to determine if the waiver of constitutional rights it entailed was valid. As Judge Waterman wrote:

> A mere routine inquiry - the asking of several standard questions - will not suffice to discharge the duty of the trial court. It is the duty of a federal judge before accepting a plea of guilty to thoroughly investigate the circumstances under which it is made... Even when the defendant is represented by counsel it has been held that the mere statement of the accused that he understands the charge against him does not relieve the court of the responsibility of further inquiry....
>
> United States v. Lester, 247 F.2d 496, 499 (2d Cir. 1957)

See also United States ex rel. Brown v. Fay, 242 F.Supp 273 277-79 (S.D.N.Y. 1965) (Weinfeld, D.J.).

Second, in light of the clear evidence of psychiatric difficulties at sentence, the contents of the presentence report, and the repeated request for psychiatric evaluation by counsel at both plea and sentence, it seems clear beyond cavil that the District Judge was under obligation to reinvestigate the circumstances of the plea. As the Eighth Circuit has commented in this very context,

> ...for the purposes of determining whether petitioner was competent to plead guilty to the federal charge, evidence of his mental state shortly after he pleaded guilty is just as relevant as evidence of his mental condition shortly before he pleaded guilty.
>
> Rose v. United States, supra, 513 F.2d at 1257 n. 6.

See also United States ex rel. Suggs v. LaVallee, supra.

Had the District Judge made the proper inquiry at the time of sentence, as he was compelled to do on the basis of the record before him, the Court would have been obligated, at a minimum, to entertain an application to withdraw the guilty plea under Rule 32(d), Fed. R. Crim. P., or, at the very least, to make some inquiry in that regard. United States v. Joslin, 434 F.2d 526, 531 (D.C.Cir. 1970); United States v. McGirr, 434 F.2d 844 (4th Cir. 1970); Sherburne v. United States, 433 F. 2d 1350 (8th Cir. 1970) (Lay, J., dissenting).

Irrespective of whether Appellant was, in fact, incompetent at either plea or sentence, the facts before the District Judge and the repeated requests for psychiatric evaluation compelled the Court to make some inquiry. Yet Judge Costantino adamantly refused to do so. The Court's failure to make inquiry is clearly an abuse of discretion warranting reversal. United States v. David, supra, 511 F.2d at 362; Featherston v. Mitchell, 418 F.2d 582, 584 (5th Cir. 1969).

In an analogous situation, this Circuit recently granted a writ of habeas corpus to a state prisoner because the trial court had failed to make sufficient inquiry into petitioner's mental competence to waive his right to counsel and to conduct a pro se defense. Judge Gurfein formulated the grounds for reversal:

> We base our conclusion only on the totality and the relationship inter se of all the circumstances, including the circumstance that no attempt was made by the trial judge to grant a new trial when he discovered before sentence that the defendant who had been permitted to waive his right to counsel had a long history of mental disease.
>
> United States ex rel. Martinez v. Thomas, F.2d , No. 75-2066 (2d Cir., December 8, 1975).

The Government's only other claim -- that the trial judge's observations of Appellant should be dispositive of the question of his competence at plea -- is similarly unavailing. While it is true that the trial judge's observations are relevant to the question of competency, they are only one factor among several to be weighed in making that ultimate determination. Clearly, the District Judge's observations cannot alone be used to foreclose further inquiry. As the Eighth Circuit stated, in addressing this very issue:

> The state contends that the trial judge is entitled to place heavy reliance on his own observations of the defendant during the trial to determine if there is a "bona fide doubt" as to the defendant's competency to stand trial. However...the critical question is not whether [the defendant] was competent to stand trial, but whether there was sufficient doubt raised as to...competency that the state trial court should have ordered a psychiatric examination and held a hearing. As the Supreme Court noted in Pate v. Robinson [citation omitted] "While [a defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity it cannot be relied upon to dispense with a hearing on that very issue." [citation omitted].
>
> Rand v. Swenson, 501 F.2d 394, 395 (8th Cir. 1974)

The failure of Judge Costantino to make any inquiry, or even conduct a voir dire, warrants outright reversal and vacatur of the guilty plea.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Appellant's main brief, it is respectfully submitted that Appellant is entitled to the relief sought.

Respectfully submitted,

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Dated: December 31, 1975

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

75-2130

JOE STEVENSON SADDLER

Appellant

against

UNITED STATES OF AMERICA

Respondent

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

49-1A Richmond Blvd. Ronkonkoma, New York 11779

That on 31st of December *19* 75 *deponent served the annexed*

Reply Brief

on United States Attorney, Eastern District of New York

attorney(s) for Respondent

in this action at 225 Cadman Plaza East Brooklyn, New York 11201

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 31st day of December, 1975.

Justine M. Rode

JUSTINE M. RODE
NOTARY PUBLIC, State of New York
No. 03-8611450 - Qual in Bronx Co.
Commission Expires March 30, 1976

Philip Castellano Jr.

The name signed must be printed beneath

PHILIP CASTELLANO JR.